71-1306

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1972

CATHERINE T. PENDERGRAFT ..... Petitioner

V.

TOM D. COOK, SUPERINTENDENT OF THE MISSISSIPPI STATE PENITENTIARY ..... Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. E. GORE, JR.
JAMES B. TUCKER
500 First Federal Building
Jackson, Mississippi 39205

Attorneys for Petitioner

APPENDIX A
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1598

MRS. CATHERINE T. PENDERGRAFT
Petitioner-Appellee

v.

TOM D. COOK, SUPERINTENDENT
OF THE MISSISSIPPI
STATE PENITENTIARY .....Respondent-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

(August 13, 1971)

Before COLEMAN, SIMPSON, and RONEY,
Circuit Judges

COLEMAN, Circuit Judge: This case is here, on habeas corpus, for the second time. We had previously remanded it, *Pendergraft v. Cook*, 5 Cir., 1970, 433 F.2d 969.

Upon remand, the District Court held that the search and seizure involved in this case was not constitutionally invalid, *Pendergraft v. Cook*, 323 F.Supp. 967 (S.D., Miss., 1971). For the reasons set forth in the reported opinion of the District Court, we affirm its judgment on this issue.

The District Court reaffirmed its earlier decision (not reached on the prior appeal) that the petitioner was constitutionally entitled to be indicted and tried

by juries from which women had not been totally and statutorily excluded (See 433 F.2d 970). On this issue, we reverse and direct that the petition be dismissed.

Mrs. Catherine T. Pendergraft, of Jackson, Mississippi, was convicted in the state circuit court of the murder of her husband. On issues no longer in existence, the Mississippi Supreme Court reversed the first conviction and remanded the case for a new trial, *Pendergraft v. State,* 191 So.2d 830 (Miss., 1966).

The new trial resulted in a second conviction, which was affirmed, *Pendergraft v. State,* 213 So.2d 560 (Miss., 1968). A direct appeal to the Supreme Court of the United States resulted in dismissal for want of jurisdiction and the denial of certiorari, *Pendergraft v. Mississippi,* 394 U.S. 715, 89 S.Ct. 1453, 22 L.Ed.2d 671 (1968), rehearing denied, 395 U.S. 941. Mr. Justice Douglas recorded his opinion that probable jurisdiction should be noted.

In both appeals from both conviction to the Supreme Court of Mississippi Mrs. Pendergraft urgently sought reversal because of the total exclusion of women from the grand jury which indicted her and the petit juries which had tried her, see 213 So.2d at 565. The Mississippi Supreme Court specifically declined to reverse on that ground, citing its decision in *State v. Hall,* 187 So.2d 861 (Miss., 1966).

In *Hall,* supra, the Court had held that the power to prescribe qualifications for jurors in state courts is vested in the legislature and that it had the power to make reasonable classifications, such as, for the causes stated, validly included the exclusion of women.

Mr. Chief Justice Ethridge dissented on the ground that the total exclusion of women from jury service is

an invalid classification, in violation of the due process and equal protection clause of the Fourteenth Amendment, as well as of §14 of the Mississippi Constitution. The Mississippi Chief Justice pointed out that in 1966 only two states in the Union had statutes completely and absolutely excluding women from jury service, these being South Carolina and Mississippi. The Chief Justice further concluded, however, 187 So.2d at 871, that a holding in line with his views "should be prospective only in its application".

In 1968, the Mississippi Legislature amended the jury statutes to permit women to serve on grand and petit juries, Chapter 335 Laws of Mississippi of 1968 (amending §1762 of the Mississippi Code of 1942, Recompiled, as amended).

When the Supreme Court of the United States denied review, Mrs. Pendergraft filed her petition for the writ of habeas corpus in United States District Court. In that petition, she contended, as in the State and Federal Supreme Courts, that she had been twice tried and twice convicted of the crime of murder by a jury composed entirely of members of the male sex, that both the indictment and the convictions were thus in denial of the equal protection and due process of law, additionally contending, as stated in the outset, that her state court trial had been rendered invalid by the admission of evidence illegally seized in violation of federal constitutional rights.

The District Court twice relied upon the reasoning of a Three-Judge District Court in the Middle District of Alabama which had held unconstitutional a similar exclusionary statute of that state, *White v. Crook,* 251 F.Supp. 401, 408 (1966). The Alabama Three-Judge Court, however, was careful to point out that its deci-

sion *should be prospective in its application* (citing cases) 251 F.Supp. at 409.

This appeal, therefore, encounters these incontrovertible facts: (1) Mrs. Pendergraft was indicted and tried by juries from which women were totally excluded by statute; (2) since 1968 Mississippi has not excluded women from jury service; and (3) there can be no currently existing justiciable controversy as to the exclusion formerly practiced, unless Mrs. Pendergraft, on collateral attack, is entitled to retrospective application of a finding of unconstitutionality.

This, then, brings us face to face with the *unreviewed* and *unreversed* decision of the Supreme Court of Mississippi in *State v. Hall, supra,* and in Mrs. Pendergraft's direct appeal, that the decision in *White v. Crook, supra,* was not binding on it, 187 So.2d at 863, and that there existed a reasonable basis for the legislative classification which excluded women from jury duty in Mississippi state courts.

We also encounter the concession of Mr. Chief Justice Etheridge and of the Alabama Three-Judge Court that any holding of unconstitutionality on this score should be entitled to *prospective application* only.

Indeed, the Fifth Circuit, in assuming, without deciding, the correctness of the decision in *White v. Crook, supra,* was of the clear view that it should not be accorded retrospective effect, *Juelich v. United States,* 5 Cir., 1968, 403 F.2d 523.

We, therefore, conclude that Mrs. Pendergraft was not entitled to habeas corpus relief in the Court below and that her petition should have been dismissed, *Linkletter v. Walker,* 381 U. S. 618, 85 S.Ct. 1731, 14 L.Ed.2d

601 (1965); *Johnson v. New Jersey*, 384 U. S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1965).

The judgment of the District Court on direct appeal is reversed. On cross appeal it is affirmed. The case is remanded with directions that the petition for the writ of habeas corpus be dismissed.

SIMPSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the Court that the search and seizure involved in this case did not deprive Mrs. Pendergraft of her Fourth Amendment protection against unreasonable searches and seizures. I therefore concur in affirmance of the cross-appeal. With respect to the issue raised on the direct appeal, I agree with the lower court that under well defined principles of the jurisprudence existing at the time of the petitioner-appellee-cross-appellant's indictment and trial, Mrs. Pendergraft must be reindicted by a grand jury and retried by a petit jury from each of which women have not been arbitrarily excluded. Accordingly, I would affirm upon the direct appeal taken by the respondent Superintendent of the Mississippi State Penitentiary.

The Court concedes that the statutory exclusion of all women from service on grand and petit juries solely because of their sex is violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Because the Court takes the position that this doctrine was first enunciated in *White v. Crook*, D.C.M.D. Ala., 1966, 251 F.Supp. 401, it reasons that the grant of the writ of habeas corpus in this case is equivalent to making the holding in *White* retroactive, something which the three-judge district court in *White* expressly declined to do. It also cites the Fifth Circuit case of *Juelich v. United*

States, 1968, 403 F.2d 523, in which it was held that the exclusion of women from appellant's 1954 federal court trial did not invalidate *his* conviction.

I am not persuaded that the decision in *White v. Crook* marks the point in time at which the State of Mississippi should have been put on notice that its statutory exclusion of women from grand and petit juries violated the Fourteenth Amendment. In *Ballard v. United States,* 1946, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181, the Supreme Court reversed mail fraud convictions because women had been systematically excluded from service on federal juries in the Southern District of California. The following language from the *Ballard* opinion is worth repeating here:

> "We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the Thiel case, we should exercise our power of supervision over the administration of justice in the federal courts, McNabb v. United States, supra, to correct an error which permeated this proceeding.
>
> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men — personality, background, economic status — and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and

systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." [footnotes omitted] 329 U.S. at 193-4, 67 S.Ct. at 264.

Hoyt v. Florida, 1961, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed. 2d 118, arose out of the alleged murder of a man by his wife. Florida law, at the time of Mrs. Hoyt's jury trial, permitted women to serve on juries only if they voluntarily registered for such service. The United States Supreme Court upheld the conviction for second degree murder on the basis that the appellant had failed to produce any substantial evidence to show an arbitrary exclusion of women from jury service as a result of the application of the Florida statute. In concluding its opinion in *Hoyt,* however, the Court noted:

"Finding no substantial evidence whatever in this record that Florida has arbitrarily undertaken to exclude women from jury service, a showing which it was incumbent on appellant to make . . . we must sustain the judgment of the Supreme Court of Florida." 368 U.S. 69, 82 S.Ct. at 166-7, 7 L.Ed.2d at 126.

Hoyt, unlike *Ballard* (which was a direct federal appeal), mounted an attack upon the Florida jury system upon constitutional grounds. In the course of its opinion

in *Hoyt*, the Supreme Court noted that only three states excluded women from jury service and Mississippi was pointedly named as one of the three. From and after 1961, the decision date of *Hoyt*, prior to the killing involved here and prior to the indictment and trial here involved, the warning flags were flying, for Mississippi to note and heed. What clearer signal had to be given to that state that its statutory policy of barring women from jury service was out of step with national policy and required modernization? Yet Mississippi did not amend its statute so as to permit women to serve on its juries until 1968, after Mrs. Pendergraft had been tried a second time for the murder of her husband before an all-male jury, under an indictment returned by an all-male grand jury in 1965. Both at the time of indictment and both trials, Section 1762 of the Mississippi Code of 1942 expressly limited competent jurors to male citizens.

The facts of this case do not present a retroactivity problem at all, when existing precedents are carefully analyzed. Between 1961 and the time of Mrs. Pendergraft's indictment in 1965, and beyond all peradventure before the second trial before an all-male jury in 1967, resulting in the sentence permitted by the majority to stand, Mississippi had ample opportunity to eliminate the statutory exclusion of women from jury service. Failure by that state to take timely and appropriate action deprived Mrs. Pendergraft of her federal constitutional rights to equal protection of the laws and to due process of law, guaranteed to her by Amendment XIV to the Constitution of the United States. These rights were in existence and were known to be in existence for many years before she was indicted and tried. It is extremely unfortunate that the false issue

of retroactivity vel non is allowed to muddy the majority's consideration of what is really a simple question.

I respectfully dissent from the reversal of the main appeal.

APPENDIX B
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1598

MRS. CATHERINE T. PENDERGRAFT
Petitioner-Appellee

TOM D. COOK, SUPERINTENDENT
OF THE MISSISSIPPI
STATE PENITENTIARY .....Respondent-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
(Opinion August 13, 1971, 5 Cir., 1971, ... F.2d .....).

(November 12, 1971)

Before COLEMAN, SIMPSON, and RONEY,
Circuit Judges

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED. Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG,

AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY,
Circuit Judges

BROWN, Chief Judge, and WISDOM, Circuit Judge, dissent from the denial of rehearing en banc.

SIMPSON, Circuit Judge, dissents from the denial of rehearing and denial of rehearing en banc for the reasons outlined in his dissent from the panel decision.

APPENDIX C
IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

Civil Action No. 4499

MRS. CATHERINE T. PENDERGRAFT ..... Petitioner

v.

TOM D. COOK, SUPERINTENDENT OF THE MISSISSIPPI STATE PENITENTIARY ..... Defendant

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OPINION OF THE COURT

Mrs. Catherine T. Pendergraft, in state custody, has filed her Application for a Writ of Habeas Corpus under Section 2254, 28 U.S.C.A., on two grounds: (1) that women were excluded from the grand jury which indicted her and from two trial juries which tried and convicted her for the crime of murder, the exclusion of women from these juries denying her equal protection of laws and due process of law guaranteed by the Fourteenth Amendment; and (2) that she was denied a fair trial for the reason that the fruits of an illegal search and seizure by state authorities were wrongfully introduced into evidence at her second trial, said search and seizure having occurred prior to her arrest and without a search warrant or warrant of arrest.

Following the affirmance of her second conviction, *Pendergraft v. State,* 213 So. 2d 560, petitioner perfected an appeal to the Supreme Court of the United States, on which certiorari was denied and a petition for a rehearing was denied. Subsequent thereto, her petition

for leave to file a writ of error coram nobis was denied by the Supreme Court of the State of Mississippi, without opinion. The parties agree that both issues were presented in the state petition and that she has exhausted her state remedies.

The Court is of the opinion that the first issue, that of the exclusion of women from the indicting and trial juries, involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an appeal from an order issued herein will materially advance the ultimate granting or not granting of petitioner's application, all as provided under Section 1292, 28 U.S.C. Accordingly, the Court confines this opinion to this first issue only.

Prior to the passage of the Civil Rights Act of 1957, the Congress provided that jurors in a federal court shall have the same qualifications as those of the highest court of law in the respective state courts. Judicial Code #275, 28 U.S.C., #411. This provision applied to grand as well as petit juries. In 1946 in a California case, where women were eligible for jury service in the state courts, *Ballard v. U.S.*, 329 U.S. 187, the Supreme Court dismissed an indictment and conviction by federal juries of two defendants, a mother and son, because of the exclusion of women from those juries. The Court held that the method of selecting a jury in the federal court from those qualified is a question of federal law, citing *Glasser v. U. S.*, 315 U.S. 60, and that the exclusion of women from the federal panel was error. An analysis of the Ballard case reveals that at least three of the justices concurred in dismissing the indictment, but not because of the jury question, and Justice Burton dissented from the majority opinion for the reason

that he did not think the jury issue should have been made retroactive.

In *Fay v. N.Y.*, 332 U.S. 261, a challenge was made to the constitutionality of a state court jury from which women were excluded, although New York State statutorily permitted their service as jurors. The Supreme Court granted certiorari, but refused to set aside the conviction on this issue, saying "This Court, however, has never entertained a defendant's objection to exclusions from the jury except when he was a member of the excluded class." P. 287 . . . . . "Until recently, and for nearly a half-century after the Fourteenth Amendment was adopted, it was universal practice in the United States to allow only men to sit on juries . . . . It would, in the light of this history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries unleavened by feminine influence. The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible but woman jury service has not so become a part of the textual or customary law of the land that one convicted must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood." PP 289-290.

With the passage of the Civil Rights Act of 1957, 28 U.S.C. #1861, Congress deleted that portion of the

law disqualifying persons for service on federal juries who are incompetent to serve on a grand or petit jury by the law of the state. Nonetheless in *Hoyt v. Florida*, 368 U.S. 57, the Supreme Court refused to set aside the conviction of a woman defendant in the state courts of Florida. She claimed that her trial before an all-male jury violated her rights under the Fourteenth Amendment, and thus established a federal question. The Florida statute permitted women to serve on juries if they volunteered. The Supreme Court denied relief, holding that the Florida statute was not unconstitutional inasmuch as Florida did not arbitrarily undertake to exclude women. The Court further said "In the administration of the jury laws proportional class representation is not a constitutionally required factor." P.69.

A turning point was reached in 1966 in the case of *White v. Crook*, 251 F. Supp. 401, a class action by men and women residents of Lowndes County, Alabama, when a three-judge Court struck down as *unconstitutional* an Alabama statute which totally excluded women from state jury service, holding that total exclusion violated the equal protection clause. The Court in referring to the Fay and Hoyt decisions said:

"In those cases the party defendant challenged the composition of the juries because of the systematic exclusion of women. In this case it is the women themselves who assert their right to serve as jurors, or, more accurately, their rights not to be excluded from jury service solely because of their sex.

"Women are allowed to serve on juries in the federal courts and in the courts of forty-seven states. Only in three — Alabama, Mississippi and South Carolina— are women completely excluded from jury service. The time must come when a state's complete exclusion of

women from jury service is recognized as so arbitrary and unreasonable as to be unconstitutional. As to Alabama, we can see no reason for not recognizing that fact at the present time." However, as Justice Burton concluded in his dissent in Ballard, the three-judge court in *White v. Crook* refused to find that its decision should be retroactive, and ruled that it should be prospective only. The time of this decision was February, 1966.

Mississippi, until June 14, 1968, like Alabama, restricted jury service in its state courts to males only. Mississippi Code of 1942 (Recompiled), Section 1762, now amended. The Supreme Court of Mississippi squarely faced the issue in June 1966 in *State v. Hall,* 187 So. 2d 861, prior to the amendment of Section 1762. In this case, the Circuit Court of Lee County quashed the murder indictment returned by the grand jury against the defendant, a woman, on her motion that she was denied the equal protection of the law as guaranteed by the Fourteenth Amendment by reason of the exclusion of women from the indicting jury under Section 1762. She cited *White v. Crook.* The state Supreme Court reversed, finding that the decision in *White v. Crook* was not binding on it, and after citing from *Strauder v. State of West Virginia* (1879), 100 U.S. 303, *Fay v. N.Y.,* supra, *Brown v. Allen* (1952), 344 U.S. 443, *Hoyt v. Florida,* supra, and other authorities, concluded that the fixing of qualifications for juries is a legislative matter, and that, if it is necessary to resort to classification, such by sex is reasonable. The Chief Justice dissented, his dissenting opinion agreeing with the holding in *White v. Crook.* An appeal from the Hall case was denied by the U. S. Supreme Court, 385 U.S. 98, for want of jurisdiction, with two Justices dissenting.

Nine months later, on the first appeal by petitioner here, her case was remanded on issues other than exclusion of women from the jury, *Pendergraft v. State,* 191 So. 2d 830. As to this issue, the Court noted that prior to the filing of the record in petitioner's appeal, *White v. Crook,* was rendered, and, pending the appeal, petitioner filed a petition in the lower court to vacate her conviction due to the ruling in *White v. Crook,* which was overruled. The state Supreme Court affirmed the lower court's ruling on the basis of *State v. Hall.* In May 1967, the state Supreme Court, as to a negro, male defendant, in his second appeal, ruled that the Federal Constitution does not require women to serve on juries in state courts, *Shinall v. State,* 199 So. 2d 251, cert. den. 389 U.S. 1014, again citing *State v. Hall.* In June 1966, the conviction of another male defendant was affirmed, *Reed v. State,* 199 So. 2d 803, app. dismd. and cert. den. 390 U.S. 413, on the basis of *State v. Hall.* In July 1967, the Fifth Circuit Court of Appeals considered the exclusion of women from Mississippi juries in *Bass v. State,* 381 F. 2d 692. Although this case affirmed the District Court's denial of removability of the issues posed therein, the Fifth Circuit had this to say:

"In testing removability we assume, without deciding, that on the intrinsic merits we would align ourselves with *White v. Crook,* M.D. Ala., 1966, 251 F. Supp. 401 (3-Judge), holding unconstitutional a like exclusionary statute of Alabama."

Notwithstanding the clear import of the federal decisions in *Hoyt* and *Bass,* on petitioner's appeal from her second conviction, in July 1968, some three weeks after the effective date of the Mississippi legislature's amendment of Section 1762 which permits women to serve on state court juries, the state Supreme Court again

ruled that petitioner was not entitled to have her indictment and venire quashed because of total exclusion of women from the grand and petit jury, *Pendergraft v. State,* 213 So. 2d 560, and, according to petitioner, the Supreme Court of the United States refused to note probable jurisdiction and denied certiorari, on April 21, 1969, no reasons given.

In December 1968, the Fifth Circuit held in *Mosley v. Smith,* 404 F. 2d 346, that a white male was not denied equal protection because he was indicted by a grand jury and tried by a petit jury from which Negroes and women were excluded. However, these were Georgia juries, from which women were not excluded by statute.

Having painstakenly studied the course of the judicial attitudes expressed in all of the foregoing cases, this Court finds, under the reasoning of *White v. Crook* that petitioner is entitled to a re-indictment by a jury from which women have not been statutorily excluded, particularly as the state court in its July 1968 decision recognized that the Mississippi statute had been amended.

An order may accordingly be drawn granting the writ with the right to defendant to file an interlocutory appeal under Section 1292, 28 U.S.C., and providing that should an appeal be taken, petitioner remain in state custody until a decision thereon. Should the state not appeal, then petitioner shall remain in state custody pending her reindictment within a reasonable time.

/s/ DAN M. RUSSELL, JR.
UNITED STATES DISTRICT JUDGE

DATED: Dec. 30, 1969

APPENDIX D
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 29229

MRS. CATHERINE T. PENDERGRAFT
Petitioner-Appellee

v.

TOM D. COOK, SUPERINTENDENT
OF THE MISSISSIPPI
STATE PENITENTIARY .....Respondent-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

(October 29, 1970)

Before TUTTLE, BELL and GOLDBERG, Circuit Judges.

TUTTLE, Circuit Judge: The Superintendent of the Mississippi State Penitentiary here appeals from a decision by the United States District Court for the Southern District of Mississippi granting a rule absolute in Mrs. Pendergraft's petition for writ of habeas corpus on the ground that she had been tried and convicted of the offense of murder in the Circuit Court of Hinds County, Mississippi by an all-male jury, following an indictment by an all-male grand jury at a time when the laws of Mississippi restricted jury service to males. The appellee's petition was based on two grounds. The first was the one on which the trial court acted, the

court determining that Mrs. Pendergraft had been denied her constitutional rights by reason of the statutory exclusion of women from jury service at the time of her indictment, trial and conviction. The second ground was a charge that some 15 hours before Mrs. Pendergraft was arrested the police officers conducted a general exploratory search of every room in petitioner's home and the outside grounds without a search warrant, as a result of which they found several incriminating objects including knives with bloodstains and other articles of a highly incriminatory nature constituting an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments.

The court recognizes that a strong case can be made out for supporting the decision of the trial court holding unconstitutional the Mississippi statute which was in effect at the time of the indictment and trial of the appellee. See dissenting opinion of Chief Justice Etheridge of the Supreme Court of Mississippi in *Hall v. Mississippi,* 180 So. 2d 861 (Mississippi 1966), appeal dismissed, 385 U. S. 98 (1966) and see *White v. Crook,* U.S.D.C. M.D. Ala., 1966, 251 F.Supp. 401, holding a similar Alabama statute unconstitutional, c.f. *Hoyt v. Florida,* 368 U.S. 57 in which the Supreme Court strongly indicated that in a proper case a statute such as this might well fall afoul the Federal Constitution. It is of interest to note that the State of Mississippi has in June, 1968, amended Section 1762 by deleting the word "male" and the problem here presented will, therefore, not arise at trials held hereafter.

The United States Supreme Court in *Blair v. United States,* 250 U.S. 273, 279 stated: "Considerations of propriety as well as long established practice, demand that we refrain from passing upon the constitutionality

of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitled him to raise it." See concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 and especially his discussion on page 346 where he states, "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon for decision." From the citations of cases which are expounded, following this introductory language, it is perfectly clear that the Supreme Court rule applies to the reaching of a constitutional issue arising from an attack upon a state statute as well as upon a constitutional question arising from an attack on an act of Congress.

As we have stated, a substantial question was presented to the trial court on the petition for habeas corpus relating to the deprivation by the state authorities of Mrs. Pendergraft's right to be free of an illegal search and seizure. Disposition of this issue would not involve passing upon the constitutionality of either state or federal statute. If the appellee's contentions in this regard were decided in her favor neither this court nor the Supreme Court would ever reach the constitutionality of the Mississippi statute in force at the time of this trial excluding women from jury service.

We conclude, therefore, that this court should refrain from reaching the constitutional question and remand the case to the District Court to enable it to pass on the second ground of complaint. In the event that the trial court should find that Mrs. Pendergraft's trial was invalid by reason of the alleged admission of ille-

gal evidence against her in violation of her constitutional rights, the State of Mississippi might well see fit to proceed not only with a new trial but to proceed also with a different indictment, proceeding under the present statute which permits the inclusion of women on jury panels, both grand and petit.

The case is remanded to the District Court for further proceedings not inconsistent with this opinion.

APPENDIX E
IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

Civil Action No. 4499

MRS. CATHERINE T. PENDERGRAFT ..... Plaintiff

v.

TOM D. COOK, SUPERINTENDENT OF THE MISSISSIPPI STATE PENITENTIARY ..... Defendant

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OPINION OF THE COURT

This cause is before the Court for the second time, having been remanded by the Fifth Circuit Court of Appeals in Cause No. 29229, October 29, 1970, with directions for this Court to pass on the issue of whether petitioner's state court trial was invalid by reason of the alleged admission of illegal evidence against her in violation of her constitutional rights.

By way of background, petitioner, Mrs. Catherine T. Pendergraft of Jackson, Mississippi, was convicted in the First Judicial District of Hinds County, Mississippi of the murder of her husband, Ralph N. Pendergraft. Her first conviction was reversed by the Mississippi Supreme Court and the cause remanded for a new trial as reflected in Pendergraft v. State, 191, So.2d 830, rendered November 7, 1966. That court primarily found reversible error in the trial court's denial to petitioner of the right to consult with counsel during a two hour recess. The state appellate court also pointed out other errors, among them that a judicial determination, in

the absence of the jury, should have been made as to whether probable cause existed for the arrest of Mrs. Pendergraft at the time a search was made of the residence. In its opinion the Court summarized that Jackson police officers, on the night of August 26, 1965, in the course of their investigation of an obviously violent death, without benefit of a search warrant, and, prior to petitioner's formal arrest the next day following an autopsy, picked up several articles, which were subsequently exhibited in the trial against petitioner. The Court, in relating the facts upon which it found that the officers were lawfully upon the premises, said that the officers conversed briefly with the accused's physician and then went to the family room where the nude body of the deceased lay on the floor covered by a bedspread. Their investigation revealed the body to be cold and stiff with seventeen visible wounds thereon. No blood or blood stains were beneath the body and the body itself appeared to have been cleaned with the exception of blood found under the fingernails and on the bottom of the feet. An investigation of the premises disclosed traces of blood on the floor of the kitchen and in the hallway. Blood was found on the doorway to the bar adjoining the family room, and a blood stained bottle and glass were found in the bar. Further investigation led to the utility room where the officers noticed the clothes dryer to be warm, and upon opening it found articles of clothing, towels and other items therein. A sponge and pillow slip were found elsewhere in the home. The Court, in finding that the officers were lawfully upon the premises, held that they could testify to that which came under their observation, but that the greater question was whether they had the right in the course of their investigation to open the bar area and to open the dryer without a search warrant

and without arrest. The Court further held that the question should have been resolved by a judicial determination of whether there was probable cause for the arrest of petitioner contemporaneous with such a search. The lack of this determination was thus one of the grounds for reversal.

Preceding the second trial and conviction, petitioner filed a motion to suppress certain evidence, contending that various articles were examined and taken by police officers from the Pendergraft residence on the night of August 26, 1965, prior to her arrest the following day, and other articles were seized and impounded on the following day under an illegal search warrant, which warrant had not been placed in evidence in the first trial, and that both searches and seizures were illegal. After a full, evidentiary hearing, the trial judge issued his written opinion on the motion finding that only certain of the articles introduced in the first trial were impounded by police officers on the night of August 26, 1965, and that the remaining articles were seized the next day following the arrest and issuance of a search warrant. As to those articles taken on the night of August 26, 1965, and addressing himself to the ruling of the Mississippi Supreme Court with respect to probable cause, the trial judge, after referring to the testimony of police officers and that of petitioner relating to the initial investigation on the night of August 26, 1965, found that the officers had probable cause to believe that a felony had been committed and reasonable grounds to believe that petitioner committed the felony. He accordingly overruled that part of the motion relating to the items seized on the night of August 26, 1965, and specified that the following items could be used as evidence by the state: (1) a band aid from

underneath the deceased's body; (2) a bottle of scotch and glass with blood stains; (3) two knives obtained in the kitchen; (4) a pillowslip with blood thereon; (5) a yellow sponge found on the floor; and (6) the bedspread covering the deceased's body. As to the search warrant, although it specifically itemized all other articles which were seized under it, the trial judge found that the affidavit on which the search warrant was issued was defective and therefore the search warrant was void. The judge accordingly sustained the motion to suppress as to all evidence seized under the illegal warrant. That evidence, including the items found in the clothes dryer, was not offered at the second trial and is, of course, not an issue here.

As to the second conviction, affirmed by the Mississippi Supreme Court on July 8, 1968, its decision appearing in 213 So.2d. 560, and which is under attack here, the Court again related the facts pertaining to the death of Pendergraft. The Court stated that on the afternoon of August 26, 1965, the deceased suffered seventeen stab wounds while alone with his wife, petitioner here, in their home in Jackson, Mississippi. About 7:30 p.m., petitioner telephoned her former brother-in-law, Grady Tucker, asking him and his wife to come to her home immediately as something had happened to Ralph. Mrs. Tucker called Dr. W. B. Tumlinson, petitioner's physician, who arrived at the Pendergraft home shortly after the Tuckers. Dr. Tumlinson called the Hinds County coroner, who in turned called the Jackson Police Department. Two detectives were dispatched to the home in response to this call. They found the nude body, as they had previously testified, covered by a pink bedspread, lying on the floor in the family room. Dr. Tumlinson, the coroner and the detectives

examined the wounds which "ranged from six puncture type wounds behind the right ear, downward to a gaping wound in his right chest, one in his right abdomen, four recent cuts just above his right knee, and numerous other cuts in the palms of his hands, the webbing between the fingers and on the outside of the fingers. All of these appeared to be shallow cuts except the ones in his chest and abdomen. His body had been completely cleaned, and there was no evidence of blood except on the sole of his right foot, on the bottom of the left big toe and around the cuticles of his fingernails." Continuing the Court said: "The detectives found a blood stain on the doorknob of a louvered door opening from the family room to an enclosed bar. On the counter of the bar they found a partially filled bottle of scotch whiskey and a whiskey glass, both of which had bloodstains on them. The kitchen adjoins the family room, and on one counter of the kitchen the detectives found a butcher knife with bloodstains on the stainless steel blade, and on another counter near the sink they found a butcher knife that had been washed and was still wet. They found a pillowslip with a bloodstain on it on a bed in a small bedroom connected with the breakfast room. When the body was turned over, a bandaid was found underneath the body. All of these items were recovered on the night of August 26, while the detectives were investigating the killing and before the appellant was formally arrested on August 27."

The Court further found that when Grady Tucker arrived, he turned the clothes dryer off at the request of petitioner and that, during the course of their investigation, the detectives discovered the dryer still warm with the items of clothing and towels in it. These were primarily the items picked up the next day under

a search warrant after petitioner had been formally arrested. The Court affirmed the trial court's refusal to allow the contents of the dryer to be introduced in evidence, and affirmed the trial court's finding that the detectives had probable cause to arrest petitioner with the consequent proper admission of the articles picked up in their initial investigation which occurred on the night of August 26, adding this: "These detectives would have been derelict in their duty if they had not been alert and observant in investigating a death which bore every indication of having been violently inflicted by the only other person present, namely, Mrs. Catherine Pendergraft; they would have been derelict in their duty if they had not followed up every lead they ran across."

As to why petitioner was not then and there arrested and booked, the appellate court stated that the doctors, the detectives and other witnesses testified that petitioner talked with a thick tongue and appeared to be under the influence of alcohol or drugs; that she was in a precarious mental, physical and emotional condition. There were numerous phone calls between Dr. Tumlinson and the district attorney, the coroner and the district attorney, and one of the detectives and the district attorney. Her doctor was unable to find a hospital room for her. After this enumeration, the appellate court said:

"It follows quite logically that the only reason the appellant was not arrested that very night was because all parties were concerned about her doubtful condition; there certainly was probable cause to suspect her. The appellant was alone with her husband in their home when he was fatally wounded and when he was stabbed seventeen times. She never denied that she had done

the stabbing; she said that he attacked her and she acted in self defense."

The Court continued:

"The items were found and taken from the immediate vicinity of the body or from the rooms adjoining the family room where the body itself was found. These articles were properly admitted into evidence."

On July 15, 1969, petitioner filed her application for a writ of habeas corpus in this Court setting forth that she was first tried on December 8, 1965, and convicted; this conviction was reversed and the cause remanded; she was tried and convicted again on January 9, 1967; this conviction was affirmed on July 8, 1968;[1] on her appeal to the United States Supreme Court, that court, on April 21, 1969, denied jurisdiction, if an appeal, and, if a petition for certiorari, denied certiorari. A petition for a rehearing was denied by the U. S. Supreme Court on June 2, 1969. She filed a petition for leave to file a writ of error coram nobis in the State Supreme Court, and on July 7, 1969, it was denied. The respondent conceded that petitioner had exhausted her state remedies, and that at every stage of her litigation she had protested the exclusion of women from both the grand and petit jurors which convicted her and the introduction into evidence of the fruits of an alleged illegal search, being the two grounds urged upon this Court.

By stipulation, the parties agreed that the official record of her second state court trial, or any portion thereof could be introduced into evidence, and further stipulated that the evidence relied on by petitioner as

[1] The Court notes her motion for a rehearing was denied on July 8, 1968.

the fruits of an illegal search consisted of a whiskey bottle, glass and pillowslip containing blood stains. Attached to the stipulation but not referred to therein was a floor plan of the residence containing a legend of where, but not when, certain articles were seized.

The matter was submitted to this Court on the pleadings, the stipulation, only that portion of the record pertaining to the hearing on the motion to suppress, and briefs. In the absence of a transcript of the record of the trial itself, showing which articles were in fact offered in evidence, and being of the opinion that petitioner's contention that she was deprived of a constitutional right in the total exclusion of women from both the grand jury which indicted her and the petit jury which tried her involved a controlling question of law, this Court confined its opinion to the jury issue only, finding in petitioner's favor.

By its remand, the Fifth Circuit Court of Appeals has now directed this Court to pass on the second ground of the petition, that is whether or not the evidence introduced into petitioner's second state trial was the result of an illegal search.

Toward this issue, the parties have offered a supplemental stipulation that (1) a transcript of the entire record of the trial in Cause No. 44,873 on the docket of the Mississippi Supreme Court, together with exhibits, or any portion thereof, may be introduced; and (2) that all the hereafter listed items were seized as evidence by members of the Jackson Police Department on the night of August 26, 1965, in petitioner's home without a search warrant and without her being arrested or advised that she was suspected of killing her husband:

(a) One pillowslip with a blood spot thereon.

(b) One glass with bloodstain thereon.

(c) One scotch whiskey bottle.

(d) One butcher knife with bloodstain on its handle.

(e) One butcher knife with water spots on its blade.

(f) One sponge with blood spot thereon.

(g) One bedspread with blood spot thereon.

Petitioner has submitted to the Court for the first time the entire transcript of her second trial and conviction including a transcript of the pre-trial hearing on the motion to suppress, all of which the Court has carefully considered along with the pleadings, stipulations and exhibits thereto, and briefs.

Supplementing the facts found by the Mississippi Supreme Court, this Court finds that the trial record reveals that the wounds inflicted on the deceased occurred in the early afternoon of August 26, 1965, at a time when the deceased and petitioner were alone in the residence. Other than petitioner's saying that she took a pill and went to sleep, the record is silent as to what happened from then until petitioner, at about 7:30 p.m., telephoned the Tuckers to come to the residence. One or the other of the Tuckers called Dr. Tumlinson, petitioner's physician, who arrived at the home around 8 p.m., or after, shortly before Tucker, his wife, and three other people with the Tuckers got there. Dr. Tumlinson called the coroner who came to the residence and who then called the Jackson Police Department. Detective Sergeants J. L. Black and S. M. Magee responded. They arrived at 9:20 p.m. Persons who had remained on the premises besides petitioner,

were Dr. Tumlinson, and the Tuckers. The police officers examined the body in the presence of Dr. Tumlinson, who probed the wounds and offered the opinion that none was fatal. The coroner arrived, and he, too, in the presence of Dr. Tumlinson examined the body. In detailing the search of the premises, the responses of the officers at various times during the trial, and particularly when read out of context, might infer that various items were picked up before the officers' attention focused on petitioner. However, in trying to determine the exact sequence of events following the examination of the body, the district attorney directed this question to Sergeant Black: "Then you had been in the house about an hour, then, before you actually conferred with Mrs. Pendergraft, according to your testimony?" His answer was: "No, sir, I wouldn't think it was an hour before we confered *to* (sic) her. Only after the examination of the body and it was determined by her and by Dr. Tumlinson that no one else was there, I asked Mrs. Pendergraft what had happened, or could she tell me what had happened." Other than the band aid and spread covering the body, immediately observable to the police, the investigation then revealed traces of blood on the floor of the family room where the body lay and on the door knob on the louvered door leading to the bar, only a few feet from deceased's head. On opening this door, the blood-smeared bottle and glass were evident. Sergeant Black stated that at one time Mrs. Pendergraft was seated in a chair next to the open doorway leading from the family room to the kitchen, and that when he went over to talk to her he noticed in clear view the bloodstained butcher knife on the kitchen counter, and the knife with drops of water still clinging to it hanging in a rack by the sink. One of the Tuckers directed his attention to the dryer in

the utility room adjoining the kitchen, which was warm to his touch, and to the bloodspotted pillow slip lying on a bed in a back room designated on the plat as an office. During the course of the evening, and while the inquest was taking place, Black testified that petitioner wandered from room to room, and at one point when she was in the master bedroom he noticed a sponge on the floor of a room on his way to see her.

In the opinion of this Court, the validity of the search hangs on the determination of whether the search led to the eventual arrest, or whether probable cause for arrest existed before the search. *Bailey v. U. S.*, 389 F. 2d 305.

As to why petitioner was not immediately arrested prior to or incident to picking up those articles not under the immediate observation of the police, the district attorney, as reflected in the transcript of the hearing on the motion to suppress, attempted to show that due to petitioner's physical and mental condition and the lack of a hospital room, petitioner's arrest was humanely delayed to the next day, yet she nonetheless was in protective custody. He attempted to do this by questioning petitioner's doctor, one of the detectives, and the coroner as to various telephone conversations had between them and himself as to what should be done with her that night. As these conversations took place outside the presence of petitioner, they were ruled inadmissible, only the inference of his attempt remaining. He then offered to testify himself, but objections to his taking the stand were sustained.

The district attorney also attempted to show that petitioner consented to the search. Officer Black, under direct examination, stated that petitioner was cooperative with the police and made no objection to the search

of the residence and examination of various articles. Petitioner denied the truth of this statement. Be that as it may, all witnesses were agreed that petitioner was in a dazed condition, from drugs, alcohol or shock. There can be no consent to a search under these circumstances. *U. S. v. Moody,* 311 F. Supp. 756. Similarly, it is doubtful that her feelings could be properly analyzed to test whether or not she was aware of being in custody, such awareness being a factor to consider in determining whether an arrest had been made. *U. S. v. Cortez,* 425 F. 2d 453; and *U. S. v. Grandi,* 424 F. 2d 399. Nonetheless such a determination is unnecessary for, as shown by its stipulation, the state admits no arrest was made. It remains, then, that the legality of the search must be tested in relation to probable cause for arrest.

"A search is not to be made legal by what it turns up." *U. S. v. Di Re,* 332 U. S. 581. Similarly an arrest is not valid if made without probable cause. In the absence of an arrest, the issue here is whether or not probable cause alone can validate a warrantless search. It apparently can if the results of the search do not determine probable cause.

Under Mississippi law, a police officer without a warrant may arrest a person when he has reasonable cause to believe that a felony has been committed and reasonable cause to believe that such person committed it. *Lathers v. U. S.,* 396 F. 2d. 525. There is no question in this case but that officers Black and Magee had authority to arrest petitioner. This is determined by Section 2470 of the Mississippi Code of 1942. However, when the constitutional validity of an arrest by a state official arises on an application for a writ of habeas corpus, federal constitutional standards alone

establish the test. *Paige v. Potts,* 354 F. 2d 212. It is the function of the federal court to determine whether the facts available to the officers at the moment of arrest would "warrant a man of reasonable caution in the belief" that an offense had been committed. *Carroll v. U. S.,* 267 U. S. 132. A hunch does not constitute probable cause. At the other extreme neither is probability a certainty or a conclusion beyond a reasonable doubt. *Lathers v. U. S.,* supra.

This Court agrees with the finding of the state supreme court that probable cause existed for the arrest of petitioner, but this of itself does not validate the search. The cause for arrest must exist independent of the search. Upon the officers' observance of the body in rigor mortis and upon their awareness that petitioner had been at home alone with the deceased throughout the afternoon and evening, they had probable cause for arrest. In the obvious fact that, when they arrived, efforts had been made to clean the body, traces of blood being present on the floor and nearby door knobs, and because of the numbers of people in and out of the premises, their efforts to gather and preserve evidence were permissible. This Court agrees that the detectives would have been derelict in their duty if they had not been alert and observant in investigating a death which bore every indication of having been violently inflicted.

If any search were valid, petitioner contends that this search was too broad in its range, relying heavily on the limited search permitted under the holding in *Chimel v. California,* 395 U. S. 752. Although the Supreme Court in a later case, *Vale v. Louisiana,* 399 U. S. 30, refrained from expressing an opinion as to whether Chimel should be applied retroactively, the Fifth Circuit Court of Appeals has refused to give it retroactive ef-

fect. *U. S. v. Bankston*, 424 F. 2d 714, and *Lyon v. U. S.*, 416 F. 2d 91. The search involved here occurred before the decision in Chimel, and under *U. S. v. Rabinowitz*, 339 U. S. 56, would have been permissible. The Fourth Amendment prohibition against warrantless searches is well established. The "exceptional circumstances" which may validate a search without a warrant were listed in the Vale decision. This Court notes that all the cases cited therein as well as those immediately above treat of searches "incident to an arrest." For them to be applicable to the present case means that "incident to an arrest" must be equated with probable cause. An informative treatment of this point is found in *U. S. v. Gorman*, 355 F. 2d 151, cited with approval in *Bailey v. U. S.*, supra. In Gorman, at pages 159 and 160, the Court pondered the circumstances of a case in which probable cause was found in support of a search made prior to an arrest:

> "If we were to hold that Roche did not consent, we would be obliged to consider another basis for supporting the search. The argument would be that when a suspect is available for immediate arrest at the place of the search, to which the police have lawfully gained access, and reasonable cause for his arrest exists, a search of personal effects without a warrant is reasonable even though arrest is postponed. The record furnishes the necessary premise. The combination of facts known to the agents—Gorman's admission to having an accomplice. Gorman's and Roche's common use of the Connor-Noel cover, Roche's disclaimer of knowledge of a person in his company answering Gorman's description, and the telephone calls from Gorman to Roche's room in the Holiday Inn — would together have constituted rea-

sonable cause for arresting Roche prior to the search of his luggage; each fact augmented the probative force of the others. Cf. United States v. Monica, 295 F. 2d 400, 401-402 (2 Cir. 1961), cert. denied, 368 U. S. 953, 82 S. Ct. 395, 7 L.Ed. 2d 386 (1962).

No Supreme Court decision speaks directly to the point. Husty v. United States, 282 U. S. 694, 700, 51 S. Ct. 240, 75 L. Ed, 629 (1931) which would seem to sanction such a search, may rest on special considerations applicable to moving vehicles. Johnson v. United States, 333 U. S. 10, 15-17, 68 S. Ct. 367, 92 L. Ed. 436 (1948), and Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L. Ed. 2d 134 (1959), which might appear at first blush to look the other way, are fairly distinguishable — Johnson on the ground that the arresting officer had no "valid basis in law" for his intrusion into the defendant's room. 333 U. S. at 16-17, 68 S. Ct. 367, and Henry on the point that no reasonable grounds existed for the arrest, conceded and held to have occurred when the car was stopped. 361 U. S. at 103, 80 S. Ct. 168. Contrast Rios v. United States, 364 U.S. 253, 262, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960). Indeed, Ker v. State of California, 374 U.S. 23, 43, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963) (opinion of Mr. Justice Clark), indicates the question to be open. We have likewise found no controlling decision in this circuit. Mr. Justice Traynor's well-known opinion in People v. Simon, 45 Cal. 2d 645, 648, 290 P. 2d 531, 533 (1955), would sustain the validity of such a search, see also Willson v. Superior Court, 46 Cal. 2d 291, 294 P. 2d 36 (1956); and Mosco v. United States, 301 F. 2d 180, 188 (9 Cir.), cert. denied. 371 U.S. 842, 83 S. Ct. 72, 9 L. Ed. 2d 78 (1962), is not to the contrary

in the circumstances here presented. Compare United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951). Lee v. United States, 98 U. S. App. D.C. 97, 232 F. 2d 354 (1956), may be distinguishable, like Johnson, on the basis of unlawful entry by the police, and would not bind us in any event. We do not understand just what values would be served by a rule that would force the police to impose a justifiable restraint on the person as a condition to making a search which, if fruitless, might cause them to decide against it; on the other hand, if the search does lead them to make an arrest for which reasonable cause previously existed, the search would seem "incident to arrest," United States v. Rabinowitz, 339 U.S. 56, 60, 70 St. Ct. 430, 94 L. Ed. 653 (1950), in any normal use of language, and the dilemma of seeking "to justify the arrest by the search and at the same time to justify the search by the arrest," Johnson v. United States, supra, 333 U. S. at 16-17, 68 S. Ct. at 370, is obviously not presented. Since, however, the alternative basis here considered has not been argued by the Government, we rest our decision on what we consider the sufficient ground of consent and leave determination of this issue for another day."

In Bailey, Judge J. S. Kelley Wright, held: "Even if the formal arrest was not made until after the search, the search will be upheld so long as there is probable cause for an arrest before the search is begun." The Gorman case was cited as authority. Later in his opinion, Judge Wright quoted from McDonald v. U. S., 335 U. S. 451, 459; "The 'exigencies of the situation made (the police) course (of action) imperative.'"

Under the reasoning of the Gorman decision and applying it and Bailey to the present case this Court

finds that independent of the search there was probable cause to arrest petitioner, and that the ensuing search was valid and necessary for the preservation of evidence, an exigency or special situation recognized in Vale.

Otherwise, the Court re-affirms its earlier decision that petitioner is entitled to be indicted and tried by juries from which women have not been excluded, particularly in view of her alleged plea of self-defense.

An order may be submitted granting the writ of habeas corpus, except that petitioner shall remain at her present place of confinement without bail, until the appropriate state officials determine within a reasonable time whether or not to seek her re-indictment and another trial.

UNITED STATES DISTRICT COURT

By: DAN M. RUSSELL, JR.

DATED: Feb. 22, 1971

APPENDIX F
IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

Civil Action No. 4499

MRS. CATHERINE T. PENDERGRAFT ..... Petitioner

v.

TOM D. COOK, SUPERINTENDENT OF THE MISSISSIPPI STATE PENITENTIARY ..... Respondent

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STIPULATION

The Petitioner, Mrs. Catherine T. Pendergraft, by her attorney, and the State of Mississippi, by Guy N. Rogers, Assistant Attorney General, in the above styled and numbered cause, do hereby stipulate and agree to the following facts:

1. That Petitioner, a female, was indicted during the November 1965 Term of the Grand Jury of the First Judicial District of Hinds County, Mississippi for the crime of murder at a time when said Grand Jury was composed entirely of members of the male sex; that a motion to quash the indictment was timely filed by Petitioner on the grounds that her constitutional rights were violated due to the fact that members of the female sex at that time were prohibited by the law of the State of Mississippi from serving either on Grand or Petit Juries, said motion to quash was overruled.

2. That, during the month of January, 1967, the Petitioner was tried and convicted by a petit jury, composed

entirely of members of the male sex, and sentenced to life imprisonment; a motion to quash the venire was timely filed by Petitioner on the same ground as the motion to quash the indictment but said motion was overruled by the trial court.

3. That Petitioner and Respondent herein agree that the official record now on file with the Mississippi State Supreme Court, together with all exhibits, may be introduced into evidence and the hearing in this cause or any portion thereof by either party.

4. That the evidence consisting of a whiskey bottle, glass and pillow slip containing blood stains was seized by members of the Jackson, Mississippi Police Department on the night of August 26, 1965 in the home of Petitioner in Jackson, Mississippi, without her being first placed under arrest or advised that she was suspected of the killing of her husband, Ralph Pendergraft, and without a search warrant. The aforesaid evidence was introduced by the State in the presence of the jury at the trial of Petitioner in January, 1967, over her timely objection.

GUY N. ROGERS
Attorney for Respondent

W. E. GORE, JR.
JAMES B. TUCKER
Attorneys for Petitioner

APPENDIX G
IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

Civil Action No. 4499

CATHERINE T. PENDERGRAFT ..... Petitioner

V.

TOM B. COOK, SUPERINTENDENT, MISSISSIPI STATE PENITENTIARY ..... Respondent

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SUPPLEMENTAL STIPULATION

Comes Mrs. Catherine T. Pendergraft, Petitioner, by her attorney, and the State of Mississippi by Guy N Rogers, Assistant Attorney General, and do hereby further stipulate and agree as to the following facts in this cause:

1. That the official Record and Transcript, and Exhibits therewith, or any portion thereof, on file in the Supreme Court of the State of Mississippi, Docket No. 44,873, and in particular the testimony of State's witness Detective Lt. J. L. Black, during the Motion to Supress (R. 39-40, R.60-86, and R. 96-115) and during the trial on the merits (R. 164-237), as referred to in Paragraph 2 hereafter, may be introduced into evidence in the matter before this Court by either party.

2. That all items listed hereunder were seized as evidence by Det. Lt. Black and members of the Jackson Police Department on the night of August 26, 1965, in

Petitioner's home without a search warrant and without her being arrested or advised that she was suspected of killing her husband:

(a) One pillowslip with a blood spot thereon, introduced as Exhibit 11 to the testimony of Det. Lt. Black (R. 203);

(b) One glass with bloodstain thereon, introduced as Exhibit 12 to the testimony of Det. Lt. Black (R. 205);

(c) One scotch whiskey bottle, introduced as Exhibit 13 to the testimony of Det. Lt. Black (R. 206);

(d) One butcher knife with bloodstain on its handle, introduced as Exhibit 14 to the testimony of Det. Lt. Black (R. 209);

(e) One butcher knife with water spots on its blade, introduced as Exhibit 15 to the testimony of Det. Lt. Black (R. 211);

(f) One sponge with blood spot thereon, introduced as Exhibit 16 to the testimony of Det. Lt. Black (R. 213);

(g) One bedspread with blood spot thereon, introduced as Exhibit 17 to the testimony of Det. Lt. Black (R. 215);

3. That each of the items listed aforesaid was introduced into evidence by the State, in the Jury's presence during Petitioner's trial in January, 1967, over her timely objection.

GUY N. ROGERS
Attorney for Respondent

W. E. GORE, JR.
JAMES B. TUCKER
Attorneys for Petitioner